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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 390

OZARK BUTANE COMPANY, INC., a Corporation of the State of Arkansas,
Appellant,

VERSUS

OKLAHOMA LIQUEFIED PETROLEUM GAS BOARD and W. D. RUSH, Liquefied Petroleum Gas Administrator,
Respondents.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

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September, 1964.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the above-styled respondents move that the judgment of the District Court be affirmed on the ground that the questions raised by appellant are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is a direct appeal from the judgment of a statutory three-judge Federal Court entered April 16, 1964, pursuant to a memorandum opinion dated February 17,

1964, which considered 52 O. S. Supp. 1963, § 420.14. The court determined that said statute was valid and constitutional as applied to the appellant corporation and directed the complaint filed therein be dismissed and the temporary restraining order be dissolved.

The Oklahoma statutes pertaining to the liquefied petroleum gas business are found at 52 O.S. 1961, § 420.1 through § 420.13. Section 420.4 thereof, immaterially amended by the 29th (1963) Oklahoma Legislature, pertains to the required annual registration permit and provides that each registration permit shall expire on September 1 of each year. 52 O.S. Supp. 1963, § 420.14, of which appellant complains, pertains to the aforementioned annual registration permit. Oklahoma Senate Bill No. 122 is found in the Oklahoma Session Laws 1963 at Chapter 27, page 28. This Senate Bill contained the emergency clause and became effective on March 26, 1963, when it was approved and signed by the Governor of Oklahoma, same being codified as 52 O.S. Supp. 1963, § 420.14.

On July 25, 1963, Ozark Butane Company, Inc., an Arkansas Corporation, filed a complaint in the United States District Court for the Western District of Oklahoma wherein it asserted that 52 O.S. Supp. 1963, § 420.14, was unconstitutional. Pursuant to the court's retraining order, appellant was permitted to continue its local business within Oklahoma. The annual registration permit issued to appellant September 1, 1962, for the business year of 1962-1963, expired under its own terms September 1, 1963. The issuance or renewal of an annual registration permit for the forthcoming business years (1963-1964,

etc.) was subject to the provisions of 52 O.S. Supp. 1963, § 420.14, which, as noted previously, became law March 26, 1963. The matter was submitted to the District Court on its merits November 1, 1963. The court's memorandum opinion was issued February 17, 1964, judgment thereon being entered April 16, 1964. Appellant submitted its Motion for a New Trial and same was denied June 12, 1964.

Upon considering the facts of this case on its merits, the United States District Court for the Western District of Oklahoma found that since September 1, 1963, appellant has not been within the jurisdiction of the State of Oklahoma, within the meaning and purview of the 14th Amendment, so as to entitle it to the equal protection of the laws. Since said date, appellant corporation has not satisfied the conditions required by Oklahoma for the acquisition of an annual registration permit in order for it to be entitled to enter and engage in the liquefied petroleum gas business within the State of Oklahoma; that appellant's right to engage in said local business within the State of Oklahoma depended upon the issuance each year of the registration permit in accordance with the applicable state laws; that a foreign corporation may be entirely barred from engaging in a local business within a state and it is not a denial of due process if the corporation might be required to dispose of its property within said state when it cannot meet the conditions for acquiring the necessary annual registration permit; that the appellant's business activities within Oklahoma, pusuant to its annual registration permit, was an intrastate activity of a purely local nature and subject to appropriate state regulations.

Appellant acquired all of its liquefied petroleum gas at refineries located in the State of Oklahoma. This gas was then transported to appellant's storage tanks in Siloam Springs, Arkansas, where same was stored and intermingled with other gas located therein. Thereafter, some of the gas was removed from these storage tanks and transported by appellant to its other storage tanks located in various Oklahoma towns where it was again stored and intermingled with other gas being stored therein. The gas remained in these Oklahoma storage tanks until individual orders were received from its Oklahoma cutsomers at some future date, at which time appellant would fill same from the gas stored in the above Oklahoma storage tanks.

ARGUMENT

The appeal from the District Court decision does not present any question of substance which would warrant further argument in this Court. Considering the facts of this case, the points involved in this appeal were settled long ago by this Court. The registration permit, which is referred to in 52 O.S. Supp. 1963, § 420.14, applies only to the purely local intrastate activities, which appellant conducted within the State of Oklahoma, and same has absolutely no application to appellant's acquiring gas in Oklahoma and transporting same in interstate commerce to its storage in Arkansas, nor does same place a prohibition or embargo on interstate commerce. Appellant is not denied the equal protection of the laws or due process, within the meaning and purview of the 14th Amendment.

I

Statute Not in Conflict With Interstate Commerce Clause

The annual registration permit, which is designated in 52 O.S. 1961, § 420.4, and 52 O.S. Supp. 1963, § 420.14, is required for a distributor or retailer of liquefied petroleum gas, such as appellant, who stores or dispenses such gas in this state for use within this state. This registration permit is not required for the appellant to acquire its gas at the Oklahoma refineries and transport same in interstate commerce to its storage tanks in Arkansas.

The Court correctly found that appellant's business activities, being conducted within the State of Oklahoma, were purely an intrastate operation, therefore subject to the registration permit requirements of the pertinent statutes of this state. The interstate feature of appellant's business ended when its liquefied petroleum gas was placed in its storage tanks located in various Oklahoma towns intermingled with other gas stored therein, same being stored there at the pleasure of the owner for the purpose of selling it at some unknown future date pursuant to individual orders from its Oklahoma customers. The aforementioned gas was not stored in the various Oklahoma towns due to the necessity of the journey or safety of the product. The District Court's determination that this was a local intrastate activity is supported by the facts and rules of law set forth in *Minnesota* v. *Blasius*, 290 U.S. 1, 78 L.Ed. 131, 54 S.Ct. 34, and *Independent Warehouse* v. *Scheele*, 331 U.S. 70, 91 L.Ed. 1346, 67 S.Ct. 1062.

A state may regulate matters of local concern over which Federal authority has not been exercised. *Cities*

Service Gas Co. v. *Peerless Oil and Gas Co., et al.*, 340 U.S. 179, 95 L.Ed. 190, 71 S.Ct. 215.

Appellant relies upon *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 54 L.Ed. 355, 30 S.Ct. 190. Therein the state attempted to tax all the corporation's stock located both within and without the State of Kansas. The Court correctly held that this was a burden and tax on its interstate business and on its property located in another state. It should be noted that the Court stated therein that there would be no objection to a state license tax based on the local business said corporation transacted within the state. The case is clearly distinguishable from the facts at bar.

Appellant also cites *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 79 L.Ed. 1032, 55 S.Ct. 497. The New York act involved therein did not completely prohibit the sale of milk in New York which was acquired in another state as appellant contends. The application of that act was an attempt by New York to determine and control the price that a Vermont milk producer could receive for his milk. The Oklahoma statute involved in this litigation does not prohibit the shipment of liquefied petroleum gas into this state from another state, under the conditions in the *Baldwin* case. This case has no application to the facts involved herein.

Hood v. *Dumond*, 336 U.S. 525, 93 L.Ed. 865, 69 S.Ct. 657, is also relied upon by appellant. The act involved therein was in conflict with the Federal Agricultural Marketing Agreement Act and attempted to forbid shipments of milk out of the state. The parties to this action agreed

that the milk involved was all being shipped out of the state in interstate commerce. A permit to conduct local intrastate business completely within the State was not involved. The Oklahoma statute considered herein does not forbid the shipment of liquefied petroleum gas out of this state. Furthermore, the registration permit referred to therein would not be applicable to such a transaction. This case has no application to the issues herein.

Consideration of the statutes involved herein will reveal same do not exclude nor prohibit appellant from acquiring liquefied petroleum gas in Oklahoma and transporting same in interstate commerce to its storage facilities in Arkansas and such a transaction would not require the annual registration permit in question.

II

Statute Not in Conflict With Equal Protection Clause

Since September 1, 1963, the appellant corporation has not been within the jurisdiction of the State of Oklahoma whereby it could assert rights under the equal protection clause of the 14th Amendment. Appellant has not satisfied the conditions required by the State of Oklahoma in order for it to acquire a registration permit authorizing it to enter and conduct its local liquefied petroleum gas business within the State of Oklahoma for the period of September 1, 1964, to September 1, 1965. The right of this appellant corporation to engage in the liquefied petroleum gas business within the State of Oklahoma depends upon the issuance of the annual registration permit by the proper state agency in accordance with the applicable

statutes. The above statements are in harmony with the District Court's determination and same are amply supported by the facts and rule of law set forth in *Fire Association of Pennsylvania* v. *New York*, 119 U.S. 110, 30 L.Ed. 342, 7 S.Ct. 108. The foreign corporation in that case was also required to obtain a license each year from the state and in discussing same the Court stated (119 U.S. at pp. 119-120, 30 L.Ed. at p. 347) as follows:

> "'The state having the power to exclude entirely, has the power to change the conditions of admission at anytime, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. * * * It could not be of right within such jurisdiction, until it should receive the consent of the state to its entrance therein under the new provisions; and such consent could not be given until the tax, as a license fee for the future, should be paid.'"

A state may entirely bar a foreign corporation from conducting its business within the state. See *Lincoln National Insurance Co.* v. *Read*, 325 U.S. 673, 89 L.Ed. 1861, 65 S.Ct. 1220, and *Horn Silver Mining Co.* v. *The People of the State of New York*, 143 U.S. 305, 36 L.Ed. 164, 12 S.Ct. 403.

It is not a denial of due process because a foreign corporation is permitted to engage in local business activities within a state under an annual permit, acquires property therein during said period, thereafter must dispose

of said property when new conditions to do business therein are imposed which it does not or cannot meet. See *Asbury Hospital* v. *Cass County, North Dakota*, 326 U.S. 207, 90 L.Ed. 6, 66 S.Ct. 61.

Appellant cites *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 54 L.Ed. 536, 30 S.Ct. 287, and *Hanover Fire Insurance Co.* v. *Carr*, 272 U.S. 494, 71 L.Ed. 372, 47 S.Ct. 179, to support its view that once a foreign corporation obtains a permit to conduct its local business within the state, even though it has a permit for only one year and must acquire another one each year for this privilege, the issuance of the very first license gives the foreign corporation citizenship in the state which it does not lose and entitles said corporation to the equal protection of the laws for all future time. Consideration of these cases will reveal they do not support this asserted theory. This Court in the *Lincoln National Insurance Co.* case distinguished the *Hanover* case and stated that the corporation involved therein had an unequivocable license to conduct business within the state. In the *Hanover* case, the corporation was within the jurisdiction of the state at the time the state attempted to tax all of said corporation's insurance business, while a similar domestic corporation was not so taxed. The *Hanover* case is clearly distinguishable. In the *Greene* case, the corporation involved therein was duly licensed and within the jurisdiction of the state at the time it was taxed under a different and more onerous rule than applied to a similar domestic company. Therein the Court stated it was not dealing with a corporation seeking admission to the state nor one having a limited license seeking to renew same. This case is also distinguishable from the case at bar.

Appellant also relies on *Airway Electric Appliance Corporation* v. *Day*, 266 U.S. 71, 69 L.Ed. 169, 45 S.Ct. 12. Therein the foreign corporation was within the jurisdiction of the state at the time it was taxed on all of its authorized stock, only a small portion of which had been issued. The Court held that the number of unissued shares had no relation to the privilege held by the corporation in Ohio as the unissued shares may never be issued or may be issued to do business in other states. Furthermore, the tax therein on all authorized stock was deemed to be a direct burden on interstate commerce. This case is not applicable to the situation at bar.

III

Appellant May Resort to Federal Courts

Appellant admits that it did not submit this theory to the court when the issues were considered on the merits. However, as appellant submitted this theory in detail to the Court in its Motion for New Trial, we will assume the Court considered same and rejected it by denying appellant's motion. Therefore, we will consider same in this Motion to Dismiss.

Appellant contends that 52 O.S. Supp. 1963, § 420.14, will destroy its foreign character and in support of this contention cites *Harrison* v. *St. Louis and San Francisco Railroad Co.*, 232 U.S. 318, 58 L.Ed. 621, 34 S.Ct. 333; *Donald* v. *Philadelphia and Reading Coal and Iron Co.*, 241 U.S. 329, 60 L.Ed. 1027, 36 S.Ct. 563; and *Terral* v. *Burke Const. Co.*, 257 U.S. 529, 66 L.Ed. 352, 42 S.Ct. 188. Consideration of these cases will reveal that in each in-

stance the state statute expressly provided for the revocation of a foreign corporation's license to conduct local business within the particular state should the foreign corporation institute a suit in a federal court, or remove an action to the federal court, which involved a citizen of the state.

52 O.S. Supp. 1963, § 420.14, has absolutely none of the restrictions or prohibitions which are contained in the statutes involved in the aforementioned cases. The Oklahoma statute under consideration does not even faintly resemble any of the statutes considered in the above cases. The rules of law expressed in the above cases are well recognized, when applied to statutes such as those involved therein, but they have absolutely no relationship to the Oklahoma statute herein nor to the facts in this case.

CONCLUSION

For the reasons stated above, the questions presented by this appeal are unsubstantial and have been determined by previous decisions of this Court. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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